

1 CABINET FOR HEALTH AND FAMILY SERVICES

2 Department for Medicaid Services

3 Division of Member Services

4 (Amended After Comments)

5 907 KAR 1:585. Estate recovery.

6 RELATES TO: KRS 205.520, 205.619, 304.14-640 to 304.14-644, 42 CFR 430.10,
7 42 CFR 435.236, 42 U.S.C. 1396p(b)(1)-(4)

8 STATUTORY AUTHORITY: KRS 194A.030(2), 194A.050(1), 205.520(3)[~~EO 2004~~
9 ~~726]~~

10 NECESSITY, FUNCTION, AND CONFORMITY: [~~EO 2004 726, effective July 9,~~
11 ~~2004, reorganized the Cabinet for Health Services and placed the Department for~~
12 ~~Medicaid Services and the Medicaid Program under the Cabinet for Health and Family~~
13 ~~Services.] The Cabinet for Health and Family Services, Department for Medicaid~~
14 Services has responsibility to administer the Medicaid program. KRS 205.520(3)
15 empowers the cabinet, by administrative regulation, to comply with any requirement that
16 may be imposed or opportunity presented by federal law for the provision of medical
17 assistance to Kentucky's indigent citizenry. 42 U.S.C. 1396p(b)(1)-(4) establishes
18 minimum requirements for state plans for estate recovery actions. This administrative
19 regulation establishes provisions relating to estate recovery.

20 Section 1. Definitions.

21 (1) "Aged institutionalized individual" means a recipient age fifty-five (55) or older

1 who received nursing facility (NF) services, intermediate care facility for individuals with
2 mental retardation or a developmental disability [~~the mentally retarded and~~
3 ~~developmentally disabled~~] (ICF/MR/DD) services, **home and community based (HCB)**
4 **waiver services, supports for community living (SCL) services, acquired brain**
5 **injury (ABI) waiver services, ABI long-term care waiver services, or Michelle P.**
6 **waiver services**~~[home and community based services (HCBS) or supports for~~
7 ~~community living (SCL) services]~~ with payment for these services made, wholly or in
8 part, by the Medicaid program.

9 (2) "Department" means the Department for Medicaid Services or its designee.

10 (3) "Estate" means:

11 (a) All real and personal property or other assets owned by the deceased recipient
12 that would be included as probate property under Kentucky law; and

13 (b) All real and personal property or other assets in which the deceased recipient had
14 legal title or interest at the time of death, to the extent of the recipient's interest, whether
15 the asset was conveyed to a survivor, heir or assign of the deceased recipient through
16 joint tenancy, tenancy in common survivorship, life estate, living trust or other
17 arrangement.

18 (4) "Estate representative" means the court appointed fiduciary or the fiduciary's
19 attorney, the recipient family member or other interested party who represents to the
20 department in writing that he or she is the representative for the estate.

21 (5) "Long-term care partnership insurance" is defined by KRS 304.14-640(4).

22 (6) "Long-term care partnership insurance policy" means a policy meeting the
23 requirements established in KRS 304.14-642(2).

(7) [(5)] "Period of institutionalization" means the period of time an aged institutionalized or permanently institutionalized individual received Medicaid services.

(8) [(6)] "Permanently institutionalized" means residing in a nursing facility or intermediate care facility for individuals with mental retardation or a developmental disability [the mentally retarded and developmentally disabled] for six (6) months or more.

(9) [(7)] "Recipient family member" means the surviving spouse, child or sibling of a deceased recipient.

(10) "State plan" is defined by 42 CFR 400.203.

(11) [(8)] "Surviving child " means a living child under age twenty-one (21)[,] or a child who is blind or disabled as defined in 42 U.S.C. 1382c.

Section 2. Recovery.

(1) The department shall seek recovery from the estate of a deceased recipient for a period of institutionalization.

(2) The amount recovered shall not exceed the amount paid by the Medicaid program on behalf of the deceased recipient for services received during a period of institutionalization.

(3) The amount subject to recovery shall include:

(a) The expenditures for:

1. **NF services**[Nursing facility (NF) services];
2. ICF/MR/DD [Intermediate care facility for the mentally retarded and developmentally disabled (ICF/MR/DD)] services;
3. Home and community based **(HCB) waiver services**:[services (HCBS); or]

4. Supports for community living (SCL) services;

5. Acquired brain injury (ABI) waiver services pursuant to 907 KAR 3:090;

6. ABI long-term care waiver services pursuant to 907 KAR 3:210; or

7. Michelle P. waiver services; or~~;~~ and

(b) Other costs for:

1. Related prescription drugs, hospital services, and related physician services; or

2. Medicare cost sharing ~~[cost-sharing]~~ or Medicare premiums.

(4) The amount subject to recovery shall include a capitation payment made by the Medicaid program to a managed care organization on behalf of the deceased recipient.

Section 3. Exemptions and Limitations.

(1) Recovery shall not be made from the estate if the estate representative can verify to the department's satisfaction that there is a:

(a) Surviving spouse; or

(b) Surviving child.

(2) Recovery shall not be made from the estate on any resources protected from consideration during the eligibility determination process based on payment issued by a long-term care partnership insurance policy.

(3) The department shall waive estate recovery to the extent the recovery would work an undue hardship.

(a) Undue hardship shall exist if an asset subject to recovery is the sole income-producing asset, for example a family farm or business, conveyed to the surviving recipient family member. A sole income-producing asset shall not include residential real property producing income through a lease or rental arrangement.

(b) The estate representative shall apply for an undue hardship exemption by:

1. Making a written request to the department within thirty (30) days of receipt of the notice provided in accordance with Section 4(3)(a) of this administrative regulation; and

2. Verifying to the department's satisfaction the criteria specified in paragraph (a) of this subsection exists for an undue hardship.

(c) The department shall issue a decision on an undue hardship exemption request within thirty (30) days of receipt of the request and supporting documentation.

(d)1. If the department denies the estate representative's request for an undue hardship exemption, the estate representative may request an appeal.

2. If an appeal is requested, an administrative hearing shall be conducted in accordance with 907 KAR 1:563, Section 4, and KRS Chapter 13B.

(e) The department shall not conclude that an undue hardship exists if the deceased recipient created the hardship by resorting to estate planning methods under which the recipient illegally divested assets to avoid estate recovery.

(4) ~~[(3)]~~(a) The department may waive recovery if it is not cost effective to recover from the estate.

(b) The department shall not consider it to be cost effective to recover from an estate if the total date-of-death value of the estate subject to recovery is:

1. Less than the administrative cost of recovering from the estate; or

2. \$10,000 or less.

(5) ~~[(4)]~~(a) The department may grant an exemption of the recovery provisions on a case-by-case basis to the extent of the anticipated cost of continuing education or health care needs of an estate heir.

(b) The estate representative shall submit to the department a written request for an exemption and provide verification to the satisfaction of the department.

~~(6) [(5)]~~(a) A deceased recipient's estate shall be subject to recovery of Medicaid program expenditures to the extent it is adjudicated through a final administrative appeal process or court action that the recipient qualified for Medicaid fraudulently.

(b) If the recipient qualified for Medicaid fraudulently, the exemptions or limitations established in this section shall not apply.

Section 4. Notification.

(1) A general written notice regarding estate recovery shall be provided by the department to an aged institutionalized or permanently institutionalized individual, or an authorized representative acting on his or her behalf, at the time the individual requests coverage of NF services, ICF/MR/DD services, HCB waiver services, SCL services, ABI waiver services, ABI long-term care waiver services, or Michelle P. waiver services~~[HCBS or SCL]~~~~[nursing facility (NF) services, intermediate care facility for the mentally retarded and developmentally disabled (ICF/MR/DD) services, home and community based services (HCBS) or supports for community living (SCL)]~~ services under the Medicaid program.

(2) When an aged institutionalized or permanently institutionalized individual who is receiving NF services, ICF/MR/DD services, HCB waiver services, SCL services, ABI waiver services, ABI long-term care waiver services, or Michelle P. waiver services~~[HCBS or SCL]~~ ~~[nursing facility (NF) services, intermediate care facility for the mentally retarded and developmentally disabled (ICF/MR/DD) services, home and community based services (HCBS) or supports for community living (SCL) services]~~

1 under the Medicaid program dies, the Medicaid provider from which the recipient was
2 receiving institutionalized services at the time of death shall be responsible for reporting
3 the death to the local Department for Community Based Services office within ten (10)
4 days of the date of death.

5 (3)(a) Upon receipt of the notice of death specified in subsection (2) of this section,
6 the department shall prepare and serve written notice of its intent to recover upon the
7 estate representative.

8 (b) The estate representative shall be responsible for notifying individuals who are
9 affected by the proposed recovery.

10 (c) If no estate representative exists, notice shall be provided to the family members
11 or heirs if the recipient has provided the department with this information through the
12 eligibility application process.

13 (4) The notice of intent to recover shall include:

14 (a) The action the department intends to initiate;

15 (b) The reason for the action;

16 (c) Exemptions and limitations to estate recovery as specified in Section 3 of this
17 administrative regulation;

18 (d) Conditions that are considered an undue hardship exemption as specified in
19 Section 3(2) of this administrative regulation;

20 (e) Procedures for applying for an undue hardship exemption as specified in Section
21 3(2) of this administrative regulation;

22 (f) The total amount subject to recovery; and

23 (g) The procedure for appealing a denial of an undue hardship exemption request.

1 ~~[Section 5. Effective Date. The provisions of this administrative regulation shall~~
2 ~~apply to an estate recovery for dates of death on and after September 1, 2003.]~~

907 KAR 1:585
(Amended After Comments)

REVIEWED:

Date

Elizabeth A. Johnson, Commissioner
Department for Medicaid Services

APPROVED:

Date

Janie Miller, Secretary
Cabinet for Health and Family Services

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Administrative Regulation #: 907 KAR 1:585
Cabinet for Health and Family Services
Department for Medicaid Services
Agency Contact Person: Debbie Keith (502) 564-6204

- (1) Provide a brief summary of:
 - (a) What this administrative regulation does: This administrative regulation establishes requirements for federally mandated estate recovery.
 - (b) The necessity of this administrative regulation: This administrative regulation is necessary for the purpose of allowing the Medicaid program to recover funds expended for institutional care provided to a recipient, consistent with the federal mandate, and to include optional areas of recovery under federal law that enhance recovery.
 - (c) How this administrative regulation conforms to the content of the authorizing statutes: This administrative regulation conforms to the content of the authorizing statutes by adopting federal mandates and including optional areas of recovery consistent with federal law.
 - (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation assists in the effective administration of the statutes by establishing the minimum requirements for the estate recovery program and adopting optional areas that will enhance recovery of funds.
- (2) If this is an amendment to an existing administrative regulation, provide a brief summary of:
 - (a) How the amendment will change this existing administrative regulation: The amendment to this administrative regulation provides provisions for estate recovery exemptions on any resources that have been protected from consideration during the eligibility determination process based on payment issued by a long-term care partnership insurance policy when a recipient participates in the long-term care insurance partnership program. The amendment after comments updates the list of program expenditures for which the Department for Medicaid Services (DMS) will attempt to recover. The initial list includes home and community-based (HCB) waiver services and supports for community living (SCL) waiver services; however, DMS has enacted additional waivers – acquired brain injury (ABI) rehabilitation waiver, ABI long-term care waiver and the Michelle P. waiver and the amendment adds those expenditures to the list of recoverable expenditures.
 - (b) The necessity of the amendment to this administrative regulation: The amendment to this regulation is necessary to allow provisions to be implement that will allow exceptions for estate recovery when a recipient participates in the long-term care insurance partnership program. The amendment after comments is necessary to clarify policy.

- (c) How the amendment conforms to the content of the authorizing statutes: This amendment conforms to the content of the authorizing statutes by adopting federally permissible exemptions on estate recovery when an applicant participates in a long-term care partnership insurance program. The Department for Medicaid Services is granted authority to implement this action by the authorizing statutes.
 - (d) How the amendment will assist in the effective administration of the statutes: This amendment assists in the effective administration of the statutes by adopting federally permissible estate recovery exemptions in order to financially benefit the Medicaid program in the long-term.
- (3) List the type and number of individuals, businesses, organizations, or state and local government affected by this administrative regulation: This administrative regulation will impact Medicaid recipients who receive institutionalized services and those who participate in a long-term care insurance partnership program. Not all institutionalized Medicaid recipients will be impacted, unless they participate in a long-term care insurance partnership program. Parties that may be impacted by the amendments to this administrative regulation are individuals receiving long-term care medical assistance, insurance agents, Department for Medicaid Services, Department of Insurance, and Department for Community Based Services. The number of individuals is undeterminable. Currently, there are approximately 27,000 individuals receiving Medicaid long-term care benefits. It is anticipated there will be an increase in the number of persons impacted as the baby boomer population increases.
- (4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:
- (a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment. The long-term care partnership insurance program is optional. Individuals, if they so choose, may gain estate recovery protection by purchasing long-term care partnership insurance and receiving services via the insurance policy.
 - (b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3). The long-term care partnership insurance program is optional. Individuals, if they so choose, may gain estate recovery protection by purchasing long-term care partnership insurance and receiving services via the insurance policy.
 - (c) As a result of compliance, what benefits will accrue to the entities identified in question (3). An individual who purchases long-term care partnership insurance and receives services covered by the long-term care partnership insurance policy, will experience an exemption from estate recovery equal to the dollar value of services received via the long-term care partnership insurance policy. For example, if an individual receives \$10,000 worth of services via the policy then qualifies for Medicaid then passes away, DMS will exempt \$10,000 from its estate recovery efforts toward the individual's estate.

- (5) Provide an estimate of how much it will cost to implement this administrative regulation:
 - (a) Initially: DMS anticipates experiencing no cost as a result of the amendment to this administrative regulation.
 - (b) On a continuing basis: DMS anticipates experiencing no cost as a result of the amendment to this administrative regulation.
- (6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: The sources of revenue to be used for implementation and enforcement of this administrative regulation are federal funds authorized under the Social Security Act, Title XIX and matching funds of general fund appropriations.
- (7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: Neither an increase in fees nor funding is necessary to implement the amendment to the administrative regulation.
- (8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation neither establishes nor directly or indirectly increases any fees.
- (9) Tiering: Is tiering applied? (Explain why tiering was or was not used). Tiering was not applied in this administrative regulation because it is applicable equally to all individuals or entities regulated by it.

FEDERAL MANDATE ANALYSIS COMPARISON

Regulation Number: 907 KAR 1:585 Agency Contact: Debbie Keith (502) 564-6204

1. Federal statute or regulation constituting the federal mandate. 42 USC 1396p(b)(1)-(4) contains the federal mandate for all state Medicaid programs to seek recovery against the estates of recipients who were permanently institutionalized or received certain institutional services at age 55 or older. 42 CFR 435.236 contains the federal mandate regarding institutionalized individuals eligible via a special income level.
2. State compliance standards. KRS 205.520(3) authorized the cabinet to comply with a requirement that may be imposed or opportunity presented by federal law for the provision of medical assistance to Kentucky's indigent citizenry.

This administrative regulation mandates recovery against estates of permanently institutionalized recipients and recipients age 55 and older who received institutional services; includes a full waiver of recovery where there is a surviving spouse or surviving child under 21, or blind or disabled; contains the mandatory provision of an undue hardship waiver process and includes criteria that are consistent with the federal guidelines included in the Centers for Medicare and Medicaid Services (CMS) Publication 45-3, Section 3810. CMS is the federal regulatory authority for the estate recovery program.

The amendments to this administrative regulation provide provisions for estate recovery exemptions when a recipient participates in the long-term care insurance partnership program. Estate is defined to include probate assets and all other real and personal property.

3. Minimum or uniform standards contained in the federal mandate. 42 USC 1396p(b)(1)-(4) mandates that the estate include all real and personal property of the recipient as defined under state probate law, and provides the state with the discretion to include all other real and personal property within the estate.

42 CFR 435.236 allows coverage for individuals institutionalized who are eligible under a special income level.

The federal statute mandates that the state has procedures under which the agency may waive recovery due to an undue hardship, but the statute does not mandate specific criteria for what would be considered an undue hardship.

The federal statute mandates that no recovery should occur when there is a surviving spouse or surviving child under 21 or blind or disabled.

The amendments to this administrative regulation provide provisions for estate recovery exemptions when a recipient participates in the long-term care insurance partnership program.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? This administrative regulation does not impose stricter than federal requirements.
5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. This administrative regulation does not impose stricter than federal requirements.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Reg NO: 907 KAR 1:585 Contact Person: Debbie Keith (502) 564-6204

1. Does this administrative regulation relate to any program, service, or requirements of a state or local government (including cities, counties, fire departments or school districts)?

Yes X No
If yes, complete 2-4.

2. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Department for Medicaid Services (DMS), the Department for Community Based Services (DCBS), and the Department of Insurance (DOI) will be affected by this administrative regulation.

3. Identify each state or federal regulation that requires or authorizes the action taken by the administrative regulation. This action is necessary to comply with requirements in HB 259 that was passed during the 2008 Kentucky General Session and resulted in a new section of chapter 205 and new sections of subchapter 14 of KRS chapter 304, specifically 304.14-640 to 304.14-644.

4. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. DMS anticipates the administrative regulation will have no impact on revenues; however, in the long run could reduce expenditures if individuals purchase and utilize long-term care partnership insurance prior to enrolling in the Medicaid program.

- (a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? DMS anticipates no increase in revenue as a result of this administrative regulation.

- (b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? DMS anticipates no increase in revenue as a result of this administrative regulation.

(c) How much will it cost to administer this program for the first year? DMS anticipates no increase in cost as a result of this administrative regulation.

(d) How much will it cost to administer this program for subsequent years? DMS anticipates no increase in cost as a result of this administrative regulation.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): .

Expenditures (+/-):